Supreme Court of Kosovo
API.-KŽI. No. 2/2011
Prishtinë/Priština
25 May 2012

IN THE NAME OF THE PEOPLE

The Supreme Court of Kosovo held a panel session pursuant to Article 26 paragraph (1) of the Kosovo Code of Criminal Procedure (KCCP), and Article 15.4 of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (LoJ) on 25 May 2012 in the Supreme Court building in a panel composed of:
EULEX Judge Tore Thomassen as Presiding Judge,
EULEX Judge Martti Harsia, EULEX Judge Dr. Horst Proetel, Supreme Court Judge Nebojša Boričić and Supreme Court Judge Gyltene Sylejmani as panel members,
With EULEX Legal Officer Holger Engelmann as recording clerk,
In the presence of the
Defense Counsel Av. [redacted] for the defendant [redacted]

In the criminal case number API.-KŽI. No. 2/2011 against the defendant:

[redacted]

in detention on remand since 10 May 2006,

Convicted in the first instance by the District Court of Prishtinë/Priština Judgment P. No. 605/2008, dated 4 August 2010, of

1. **Aggravated Murder** in violation of Article 147 paragraph 1 item 11 of the Criminal Code of Kosovo (CCK)and

2. **Unauthorized Ownership, Control, Possession or Use of Weapons** in violation of Article 328 paragraph 2 of the CCK

And punished with an aggregate sentence of long-term imprisonment of twenty-two (22) years, with the time spent in detention counted as part of the sentence;

On 20 April 2011 the **Supreme Court of Kosovo** in an appeals panel composed of five (5) Kosovan Supreme Court Judges with Judgment AP.-KŽ. No. 10/2011 granted the Appeals of the Public Prosecutor and the injured party and **amended the Judgment** of the District Court of Prishtinë/Priština P. No. 605/2008, dated 4 August 2010, **in regards to the punishment, sentencing the defendant to an aggregate term of twenty-five (25) years of long-term imprisonment, while rejecting the Appeal of the Defence as unfounded.**

On 4 July 2011 the Defense Counsel [redacted] on behalf of the [redacted] timely filed an appeal against the Judgment of the court of second instance.

The Office of the Chief State Prosecutor of the Republic of Kosovo (OSPK), with a response dated 18 July 2011 and registered with the Registry of the Supreme Court of Kosovo the same day, fully objected to all aspects of the appeal as ungrounded and therefore proposed to reject it and to affirm the contested Judgment.

Deciding on the appeal of the Defence Counsel [redacted] filed on behalf of the defendant on 4 July 2011 against the Judgment of the Supreme Court of Kosovo AP.-KŽ. No. 10/2010, dated 20 April 2011 and based on the written Verdict of the Judgment P. No. 605/2008 of the District Court of Prishtinë/Priština, dated 4 August 2010, while also having taken into consideration the Response of the OSPK, filed on the 18 July 2011, the relevant file records and documents and the oral submissions of the parties during the session on 25 May 2012, together with an analysis of the applicable law, the Supreme Court of Kosovo, following the deliberations on the same day, hereby issues the following:

JUDGMENT

The appeal filed by the Defence Counsel on behalf of the defendant [redacted] on 4 July 2011 against the Judgment of the Supreme Court of Kosovo AP.-KŽ. No. 10/2011, dated 20 April 2011, is REJECTED AS UNFOUNDED. The Judgment of the Supreme Court of Kosovo AP.-KŽ. No. 10/2011, dated 20 April 2011, is AFFIRMED.

REASONING

I. Procedural History

On 10 October 2005 in the village of Babimoc/Babin Most (Municipality of Obiliq/Obilić) the brothers [redacted] and [redacted] were shot dead.

The defendant [redacted] was arrested on 10 May 2006 after he gave himself up voluntarily.

On 3 August 2006 the District Public Prosecutor of Prishtinë/Priština filed the Indictment PP. No. 770-1/2005 against the defendant [redacted] charging him with **Aggravated Murder** of [redacted] and [redacted] and **Unauthorized Ownership, Control, Possession or Use of Weapons.**

The indictment was confirmed with Ruling KA. 578/06 on 2 October 2006.

The first main trial commenced on 12 January 2007 before a panel of the District Court of Prishtinë/Priština composed of 2 professional and 3 lay judges. After 5 more sessions on 22 July 2007 the panel of the District Court of Prishtinë/Priština found the defendant guilty of two counts of Murder pursuant to Article 146 of the Provisional Criminal Code of Kosovo (PCCK), punishable as **Aggravated Murder** according to Article 147 paragraph 1 item 11 of the PCCK and **Unauthorized Ownership, Control, Possession or Use of Weapons** contrary to Article 328 para. 2 of the PCCK and sentenced him to long-term imprisonment of twenty-two (22) years.

On 27 August 2008, upon appeals filed by the defence and the prosecution, the Supreme Court of Kosovo annulled the first instance judgment and returned the case for retrial.

With decision of 3 July 2009, acting upon the request of Defence Counsel [redacted] filed on 29 January 2009, the President of the Assembly of EULEX Judges assigned the retrial case to EULEX judges in the District Court of Prishtinë/Priština.

The retrial before a panel of two EULEX judges and a Kosovan judge of the District Court of Prishtinë/Priština commenced on 3 December 2009 and continued through 11 sessions (on 3, 10 and 14 December 2009, 10 February, 31 March, 8 and 23 April, 21 May, 15 June, 3 and 4 August 2010).

The court heard the testimony of the following witnesses: [redacted] and [redacted] the expert witnesses Dr. [redacted] and [redacted], as well as examined the defendant, [redacted] and did a reconstruction of the crime scene at the site where the victims were deprived of their lives.

In addition, the court of first instance ruled to administer numerous documentary evidence, among them the crime scene and forensic reports filed by the KP on 14, 15 and 21 October 2005, the Forensic and Ballistic Expertise dated 1 June 2007, the Supplementary Ballistic Report dated 16 December 2009, the *post mortem* examinations of the victims [redacted] and [redacted] dated 30 October and 10 November 2005, the contract of purchase of immovable property between [redacted] as seller and [redacted] as buyer conducted on 20 September 2005 at the Municipal Court of Prishtinë/Priština, the statements of several witnesses recorded in the years 2005 and 2006 and the minutes of the first main trial.

The Indictment was lastly orally amended during the trial session on 3 August 2010 to include the words: "*...after having an instantaneous argument among the defendant and the now two deceased,* [redacted] *and* [redacted] *and* [redacted] ..."

Based on the evidence obtained, the court established the factual situation and on 4 August 2010 announced the judgment, pronouncing the defendant guilty of **Aggravated Murder** of [redacted] and [redacted] and **Unauthorized Ownership, Control, Possession or Use of Weapons.** The District Court sentenced the defendant to an aggregate sentence of twenty-two (22) years of long-term imprisonment.

The Judgment was timely appealed by the District Prosecutor of Prishtinë/Priština, the representative of the injured party, Lawyer [redacted] and the Defense Counsel of the defendant [redacted]

On 20 April 2011 the Supreme Court of Kosovo in an appeals panel composed of 5 Kosovan Supreme Court Judges with Judgment AP.-KŽ. No. 10/2011 granted the appeals of the Public Prosecutor and the injured party and amended the Judgment of the District Court of Prishtinë/Priština P. No. 605/2008, dated 4 August 2010 in regards to the punishment, sentencing the defendant to an aggregate term of twenty-five (25) years of long-term punishment, while rejecting the appeal of the defence as unfounded.

The Judgment was served on the defendant on 22 June 2011.

On 4 July 2011 the Defense Counsel [redacted] on behalf of the [redacted] timely filed an appeal against the Judgment of the court of second instance.

The OSPK, with a response dated 18 July 2011 and registered with the Registry of the Supreme Court of Kosovo the same day, fully objected to all aspects of the Appeal as ungrounded and therefore proposed to reject it and to affirm the contested Judgment.

II. Submissions of the parties

1. The Appeal

The defendant on 4 July 2011 timely filed an Appeal against the Verdict of the Supreme Court of Kosovo dated 20 April 2011 (Ap.-Kz. No. 10/2011). It was asserted that the Judgment contains essential violations of the criminal procedure, erroneous and incomplete determination of the factual situation, violations of the criminal law and that the criminal sanctions imposed were unjust. The defendant proposes to approve the appeal and annul or modify the judgment.

He challenges in particular that the Supreme Court failed to eliminate the existing contradictions, inconsistencies and ambiguities in the first instance Judgment in regard to the actions of the victims against the defendant before and during the deadly shots and concerning the motive of the defendant for undertaking the incriminating actions.

The enacting clause of the District Court Judgment is internally contradictory when finding that the defendant had "*...willingly after an instantaneous quarrel murdered* [redacted] *and* [redacted]", and on the other hand finding a few lines further that the defendant after the verbal disagreement had been "*...dragged by the victims out of the field to the side road.*"

The fact that the word "dragged", which was found missing in the Albanian version of the enacting clause of the first instance Judgment, was wrongfully qualified as technical mistake by the Supreme Court. If that had been the case, the Court should have rectified it by separate Ruling.

The contested Judgment violates the criminal law since it fails to apply the provision of Article 8 paragraph 2 of the CCK. The defendant when shooting at the victims was reacting to an unlawful, real and imminent attack from the three [redacted] brothers.

Alternatively, if not finding the circumstances of Necessary Defence as present, the Appellate Court should have considered the provision of Article 8 paragraph 3 of the CCK and qualified the action of the defendant as exceeding the limits of the Necessary Defence.

The factual situation was not determined in a complete and accurate way, specifically in respect to the legitimacy of the use of the land by the [redacted] family, the question if there had been a life threatening or any assault on the defendant by the three [redacted] brothers and if the actions taken by the defendant were in order to defend himself from such an attack.

He also claims that the Supreme Court has failed to consider all relevant facts and circumstances for the calculation of the punishment, as prescribed by Article 64 of the CCK. The punishment is not proportionate with the level of criminal liability of the accused and with the intensity and social risk of the criminal offence. In particular the formulation "*...the very cruel manner in which the criminal offence was carried out*" is not supported by the findings of the court of first instance. The Appellate Court should have applied the provision of Article 8 paragraph 3 and 4 of the CCK and reduced or waived the punishment.

2. The Response of the OSPK

The OSPK, with a response dated 18 July 2011 and registered with the Registry of the Supreme Court of Kosovo the same day fully objects to all aspects of the Appeal as ungrounded and therefore proposes to reject it and to affirm the contested Judgment related to [redacted]

In particular, the OSPK states that the Defence Counsel unjustly claims in the Appeal that the factual situation was not determined correctly and completely. This claim is without substance. The court of first instance had fully established all facts necessary to assess the defendant's criminal liability. The court did not find evidence that there had been an immediate attack on the life of the defendant by the late victims or that they had planned to attack him. Neither could the defendant's claim be proven that they had threatened or attacked him with a screw driver. A search by the police for such a tool at the site of the shooting and in the victims' vehicle had produced no result.

The enacting clauses of the challenged Judgments are clear, comprehensible and without contradictions. They don't contain violations of the criminal law and the sanctions imposed were proportional to the established criminal liability of the accused and took into consideration all relevant aggravating and mitigating circumstances.

III. Findings of the Supreme Court of Kosovo

The Appeal was timely filed and admissible but unfounded.

1. **Substantial violation of the provisions of the Criminal Procedure**

Pursuant to Article 430 paragraph 2 in conjunction with Article 415 paragraph 1 of the KCCP, the Supreme Court of Kosovo had *ex officio* to examine the appealed Judgments for the violations enumerated there.

The Panel establishes that the Supreme Court in the second instance had subject matter jurisdiction and had been properly constituted. None of the other enumerated provisions were violated, with the exception of the one of Article 403 paragraph 1 item 12 of KCCP, which is being discussed below.

The Supreme Court of Kosovo finds the enacting clause of impugned Judgment clear, comprehensible and without any internal contradictions or inconsistencies or contradictions or inconsistencies with the grounds of the Judgment.

The Appeal merely re-states the arguments that had been submitted in the appeal against the first instance Judgment and that were already discussed and rejected in the contested Judgment of the Supreme Court.

The Panel fully concurs with the reasoning of the contested Judgment on page 3, 4th paragraph (English version), where the Supreme Court elaborates that the alleged contradictions challenged by the Defence are only expressional variations with no differences in meaning and that they do constitute contradictions.
The Court observes that the terms "quarrel" and "verbal disagreement" have the same meaning and can be used synonymous. Neither is there a contradiction in the timing of the two formulations. Both times it is stated that the incriminating actions of the defendant took place after the disagreement/quarrel with the [redacted] brothers. The fact that the defendant had been dragged by the victims is a mere addition to the information given in the first part of the enacting clause. In no way can it be interpreted as a contradiction.

In regard to the word "dragged" that was found missing in the Albanian version of the enacting clause of the first instance Judgment, the Supreme Court correctly qualified it as a minor technical error. There was no need for separate correctional ruling since the error was stated and corrected by the second instance Judgment.

2. **Erroneous or incomplete determination of the factual situation**

The defendant challenges that the determination of the factual situation was incomplete and erroneous.

The Court observes that the burden of proof for the exculpating circumstance of Necessary Defence claimed by the defendant lies with him. However, no credible evidence for any ongoing or immediate attack at the moment when the defendant fired the shots towards the victims was presented.

It is not relevant whether the dragging out of the field of the defendant by the [redacted] brothers is to be interpreted as attack, since it not contested that this act was finished and not immediate anymore at the time in question.

There is no evidence supporting the defendant's claim that the victims returned after the initial quarrel, nor for the claim that one of the brothers had taken a screw driver or similar tool from the car, which he was intending to use for an attack. The defendant's claim in that regard was disputed and no evidence could be found to support his claim.
Also the ballistic findings are contradicting quite convincingly such an assertion. The victims were shot from a distance of 6 to 7 meters. At least 3 shots were fired and they very likely were aimed at the victims and not fired into the air as warning shots.

There is no evidence either for an excess of the limits of Necessary Defence, which could lead to a mitigation or a waiver of punishment. Both contested Judgments have correctly and comprehensively discussed the question and have come to the correct conclusion.

The contested Judgment in line with findings of the District Court during the main trial correctly found that it is no matter of dispute that the [redacted] family had been using the field according to a rental agreement with the previous owner [redacted] Until the sale of the land in question on the 20 September 2005 to the cousin of the defendant, [redacted] this was the case.

The defendant's allegations that the [redacted] family had actually occupied the land, hindering its sale, and that the witness [redacted] had been threatened by the late victims to give up his intention to purchase the land in question are neither substantiated nor relevant. These are mere unsubstantiated claims of the defendant, not supported by any evidence. They are not relevant for the evaluation of the defendant's criminal liability since it is undisputed that the land had been sold at the aforementioned date to [redacted] who had let it to the defendant in order to work it.

The motive of the defendant was specifically and consistently with all other factual findings determined as having acted out of humiliation and anger about having been forcefully dragged from the field he was ploughing.

3. Violation of the Criminal Law

The Panel finds that the court of first instance as well as the Appellate Court are mistaken when they assess if the defendant's life was attacked. This is of no relevance for the question if a situation of necessary defence existed. Sufficient is an immediate attack on any legally protected right or value. The question of what the attack was aimed at, e.g. life or body, etc., becomes only relevant for the proportionality of the defensive action. A person acting in necessary defence is entitled to use deadly force even against a non-life threatening attack, as long as no other means of defence are available.
However, as elaborated above, in the current case no evidence was found that there had been any present or immediate attack. The mentioned misconception in the reasonings of the contested Judgment of the Supreme Court and the Judgment of the District Court did not influence the correctness of the enacting clause.

The contested Judgment has clear and unambiguously qualified the elements of the criminal offences committed by the defendant. The Supreme Court finds the claim of the Defence that the defendant had acted in Excess of the limits of Necessary Defence without merit. Even for the institute of Excess of the limits of Necessary Defence all the elements required by Article 8 paragraph 2 of the CCK for Necessary Defence have to present – an

unlawful, real and imminent attack on a legally protected right or value and an act aimed at averting such an attack. Only the element of proportionality of the act to the degree of danger posed by the attack is missing. It was already established above that the previous instances had correctly concluded the absence of an immediate attack at the moment of the shooting.

4. Decision on the criminal sanctions

The Panel finds the defendant's opinion that the imposed punishment is inappropriate and draconic and thus at least needs to be seriously lowered as unsubstantiated. The impugned Judgment has determined the punishment correctly and without legal mistake, pursuant to Article 64 paragraph 1 of the CCK.

The Appellate Court upon the appeals filed by the prosecution and the injured party re-evaluated the criminal sanctions. It established that the court of first instance had failed to evaluate and weigh all relevant mitigating and aggravating circumstances.

The punishment frame provided by the provision of the Article 147 item 11 of the CCK ranges from imprisonment of 10 years until long-term imprisonment, which according to Article 37 paragraph 2 of the CCK as separate punishment ranges from imprisonment of twenty-one (21) to forty (40) years. In taking into account the mitigating circumstances established by the first instance, as there are the high age of defendant (63 years at the time of the commission of the criminal offences) and the fact that he had expressed grief over the deaths of the two victims and on the other side the aggravating circumstances: the high intensity of danger to the life of other human beings, the fact that he made victims' children orphans, the cruel way the offense was committed and his conduct after the offence was committed the Supreme Court arrived at a punishment of twenty-five (25) years of long term imprisonment – a sanction almost exactly in the mid of the range between the minimum of ten (10) years imprisonment and the maximum of forty (40) years of long-term imprisonment.

In regard to the second offence committed, the Unauthorized Ownership, Control, Possession or Use of Weapons pursuant to Article 328 paragraph 2 of the CCK, the contested Judgment correctly took into account the defendant's guilty plea and correctly arrived at a punishment at the lower limit of the frame provided by the legal provision of Article 328 paragraph 2 of the CCK for imprisonment sentences, of one (1) year.

In accordance with the rules provided by Article 71 paragraph 2 subparagraph 1 of the CCK, the Appellate Court without legal mistake aggregated the punishments for the two offences to one sentence of twenty-five (25) years of long-term imprisonment.

5. Conclusion of the Supreme Court of Kosovo

Consequently, for the foregoing reasons the Supreme Court of Kosovo has decided as in the enacting clause, in accordance with Article 430 paragraph 2 as read with Articles 420 paragraph 1, item 2, 423 of the KCCP.

Presiding Judge:

Recording Clerk

Tore Thomassen
EULEX Judge

Holger Engelmann
EULEX Legal Officer

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